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Dec.	19, 1923.	Decree Entered in this Suit.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 365.

INDUSTRIAL ASSOCIATION OF SAN FRANCISCO, CALIFORNIA INDUSTRIAL COUNCIL INDUSTRIAL ASSOCIATION OF SANTA CLARA COUNTY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

REPLY BRIEF FOR APPELLANTS.

The purpose of this reply brief is to direct the attention of the Court to the question which these defendants believe presents the important issue in this case:

> Did these defendants violate the Anti-Trust Act when they refused in San Francisco to sell State building materials to contractors and owners who did not operate on the American Plan?

[Italics in quotations are ours.]

[Transcript references are indicated thus (p. —).]

This question is not dealt with at length in the brief for the Government, although it is there urged that the permit system on State goods did restrain interstate commerce in violation of the Anti-Trust Act. The defendants contend that the permit system, applying as it did to State materials only, does not violate the Anti-Trust Act.

The Government presents its case as follows (brief for appellee, p. 125):

> "The case now presented is based upon the fundamental proposition that employers may not be compelled to surrender their constitutional right to make any lawful contract with their employees with respect to membership or nonmembership in a union by a concerted effort to control building materials coming into a State from outside sources."

These defendants deny that they attempted to or did control building materials coming into California from outside sources, and they claim that the evidence supports their position.

The Government realizes that to make out its case it must show a restraint of *interstate* commerce. We submit that no such restraint is shown by the evidence. The evidence shows:

> 1. That the sole object and intent of the defendants was to establish the American Plan in the building industry in San Francisco and to terminate the discrimination against competent workers because they

were not members of a San Francisco labor union.

2. That to secure the adoption of the American Plan the defendants established the permit system, under which they refused to sell certain specified materials all produced in California, save plaster produced in adjoining States and warehoused in San Francisco, to contractors who enforced the closed shop in San Francisco. That at no time did the permit system apply to materials originating outside the State, save as to said plaster.

3. That the acts of the defendants were confined to California, and no lists were circulated outside the State.

4. That the record does not show a single instance of anyone who failed to buy or was prevented from buying materials from without the State, because he could not buy State materials subject to the permit system.

We submit that the record fails to support the contention of the Government that these defendants restrained interstate commerce.

The defendants did not anticipate that a large part of the brief of the Government would be devoted to a recitation of evidence of alleged direct interferences with interstate commerce, in which the evidence claimed to show such interferences is quoted, the evidence in contravention or explanation being, in most cases, omitted.

In an attempt to anticipate the argument on the so-called direct interferences, the appellants de-

voted pages 99 to 113 of their brief to a discussion of the evidence on this queston. However, the recitation of a portion of the evidence at length in the brief of the Government makes it advisable to refer once again to the evidence.

1. THE SO-CALLED PLUMBERS' REFUSALS CEASED IN NOVEMBER, 1922, SIX MONTHS BEFORE THE BILL IN THIS CASE WAS FILED.

Much space is devoted in the brief for the Government to the recitation of evidence on the so-called plumbers' refusals, and a large part of the argument is based upon these refusals and the circulation among the plumbing-supply houses in San Francisco of lists of plumbers who were operating on the closed-shop plan. It is most important to remember that these so-called plumbers' refusals had no connection with the permit system, which never covered plumbing supples, and that these refusals and the circulation of the lists absolutely ceased in November, 1922, six months before the bill in this case was filed. They are, therefore, of no importance or significance in this case and should be disregarded. (See Appellant's Brief, page 22, and this brief, page 37.)

2. NO LISTS CIRCULATED OUTSIDE STATE BY DEFENDANTS.

In the brief for the Government an argument is made that these defendants, by the circulation of

information among people in other States, restrained interstate commerce. On page 106 of its brief, the Government says:

> "The very circulation of information among the manufacturers of plaster, lime, cement and plumbing materials, located in States other than California, of the names of contractors and builders or dealers who were not operating on the American Plan or who refused to pledge themselves to operate upon that plan, was intended to have the natural effect of causing such manufacturers to withhold sales and shipments from the concerns so listed."

No information or lists of the names of persons not operating on the American Plan were ever sent or circulated outside the State of California by these defendants. The permit system did not include the sending out of lists of persons not operating on the American Plan, but operated in a different way—that is, through the issue of permits for materials.

During the period of the so-called plumbers' refusals, lists of the names of plumbing contractors who operated on the closed-shop basis were sent by the Industrial Asociation to San Francisco plumbing-supply houses. The names and addresses of the plumbing-supply houses to which such lists were sent are given on page 154 of the transcript. They are all located in San Francisco. The sending out of these lists ceased on Novem-

ber 8, 1922, six months before the bill in this case was filed (p. 206).

We submit that there is no evidence in the record that these defendants sought to or did interfere with interstate trade by circulating in other States lists of names of closed-shop contractors.

3. THE PERMIT SYSTEM; THE IMPORTANT QUESTION.

(a) The Permit System was Local in Its Application and Covered State Materials Only.

The permit system covered only State materials; materials produced in California and destined for use in the strike area. The only exception to this was some plaster, produced in adjoining States, brought to San Francisco, placed in stock, and sold for local consumption. All of the remaining materials subject to the permit system—cement, lime, ready-mixed mortar, clay products, rock, sand and gravel—were produced in California (Appellant's Brief, p. 17; also this brief, page 20). The permit system never applied to plumbing or other materials produced outside the State.

The defendants frankly admit:

1. That, to prevent the enforcement of the closed shop in the building industry in San Francisco, they attempted to secure the adoption of the American Plan.

2. That to secure the adoption of the American Plan they refused to sell certain State building materials, for use in San Francisco, to contractors who did not operate on the American Plan and who discriminated against qualified workmen simply because they did not belong to a San Francisco labor union.

The defendants claim that these acts do not constitute a restraint of interstate commerce in violation of the Anti-Trust Act.

The defendants had no desire or intent to interfere with traffic in building materials produced in other States. They did desire to establish the American Plan in San Francisco, and to accomplish this purpose they did refuse to sell sand and gravel and certain other State-produced materials to contractors who enforced the closed shop. They did not care whether a closed-shop contractor bought all the materials he desired from without the State, but he could not purchase the materials produced inside the State which were subject to the permit system. As the sand and gravel used in building in San Francisco are produced in San Francisco, it can readily be seen that the defendants, to accomplish their purpose, were under no necessity to interfere with materials coming from other States, and the evidence shows that they purposely avoided interfering in any way with such materials.

1. The defendants contend that the decree enjoining the permit system as to interstate goods is

in error because the permit system did not apply to interstate goods and the defendants did not interfere with the sale or transportation of interstate goods.

2. The defendants contend that the decree enjoining the permit system on State goods is in error because the permit system on State goods does not violate the Anti-Trust Act.

(b) The Court Below Enjoined the Permit System as Applied to State-Produced Materials.

The Court below enjoined the defendants from refusing to sell State-produced materials to any contractor who did not operate on the American Plan. This is made clear by a reading of the opinion and decree. (The opinion is reported in 293 Federal Reporter, 925.)

The learned judge, in his opinion (pp. 34-36), said:

> "From all this mass of evidence, much of it contradictory, certain facts stand clearly forth. The first is that the defendants are acting in concert for the purpose of putting into effect and maintaining what is by them designated the 'American Plan' in the building industry in San Francisco and some of its neighboring counties. * * * With the merits or demerits of this plan, as with the recurring conflicts between employers and labor unions, this Court, acting within its jurisdiction, cannot lawfully be

concerned. * * * The purpose of the defendants therefore, in so far as it may be sought or attained without running counter to the Federal laws, cannot be interfered with by a Federal Court. * * * And this brings us to the second fact that the evidence clearly shows, and that is that the so-called permit system is the principal means by which the concerted action is rendered effective. Under this system, no one can purchase building materials covered thereby, without obtaining a permit from the permit bureau of the Builders Exchange, and no one can secure such a permit who will not pledge himself to run his job on the American Plan. * * * A third outstanding fact is that plumbers' materials, which are manufactured for the most part without the State, while not directly under the permit system, were just as effectively dealt with by the simple process of refusing a permit to purchase the materials that were under the system to any one who employed 'a bad plumber,' that is to say, one not operating on the American Plan. * * *

"However little intended to interfere with interstate commerce as claimed by the defendants, the result of their concerted action is such an interference therewith as under the Sherman Act cannot be tolerated. The Court, however, has no desire to go further in curbing their activities than the protection of such commerce requires.

"The defendants will not be dissolved nor their general activities interfered with, but a decree will be entered enjoining them from

requiring any permit for the purchase of materials or supplies produced without the State and coming here in interstate commerce, or from making as a condition for the issuance of a permit any regulation which will interfere with the free movement of plumbers' or other supplies produced without the State. They will also be enjoined from attempting to prevent or discourage any person without the State from shipping goods to any person whatever within the State."

Following this opinion, a decree was entered on December 19, 1923, which restrained the defendants from

> "(*a*) Requiring any permit for the purchase, sale, or use of building materials produced without the State of California and coming into said State of California in interstate or foreign commerce;
>
> (*b*) Making as a condition for the issuance of any permit for the purchase, sale or use of building materials or supplies any regulations that will interfere with the free movement of building materials, plumbers' or other supplies produced without said State of California;
>
> (*c*) Attempting to prevent or discourage any person without said State of California from shipping building materials or other supplies to any person whatsoever within said State of California * * *" (p. 38).

From this opinion and decree, it is clear that the learned judge below intended to prohibit the defendants from

> 1. Requiring permits for materials produced without the State, whether such goods were "in interstate commerce" at the time such permits were required, or had come to their final resting place in San Francisco.
> 2. Requiring, as a condition for the issuance of permits *for State-produced materials,* that the intended user should not employ a "bad" plumber or any other contractor who did not operate on the American Plan.

Here is presented the important question in this case.

This is not whether the defendants may or may not interfere with direct interstate shipments of building materials. Defendants contend that they did not interfere with such shipments, and that such alleged interference was no part of their plan.

The question is this: Shall these defendants be enjoined from refusing to sell State-produced building materials, intended for local use, to persons who do not operate on the American Plan?

(c) The Permit System Does Not Violate the Anti-Trust Act.

The Government contends in its brief that the refusal to sell State-produced materials to contractors who did not operate on the American Plan

violates the Anti-Trust Act. It bases its contention upon the argument that the refusal to sell State-produced materials restrains and interferes with interstate commerce in materials produced outside the State; that a refusal to sell San Francisco sand to a contractor because he employs a closed-shop plumber restrains interstate commerce in plumbing materials, although the contractor or plumber may buy all the plumbing materials he wishes without interference from defendants, for the permit system does not cover plumbing materials.

The argument of the Government is stated at page 91 of its brief as follows:

> "The plan was in force not to issue permits for any building material until it was known that the plumbing contractor would support the American Plan. If the plumbing contractor was not satisfactory, none of the articles on the permit list could be purchased; and if none of the articles on the permit lists could be purchased, then necessarily the plumbing supplies could not be purchased."

There is no evidence in the record that any person ever failed to buy plumbing materials or other goods produced outside the State because he could not buy State-produced materials which were under the permit system. It is left to inference and speculation as to what effect the refusal to sell State materials subject to the permit system had on the purchase of materials produced outside the State.

It probably had no effect whatever; but if it had any effect, we submit that it was so remote, indirect, secondary and incidental as not to make these defendants guilty of a violation of the Anti-Trust Act. The law on the subject is fully discussed in our opening brief.

4. CONSIDERATION OF THE BRIEF FOR THE GOVERNMENT, INCLUDING THE EVIDENCE ON ALLEGED DIRECT INTERFERENCES WITH INTERSTATE COMMERCE.

We will discuss briefly the topics discussed in the brief of the Government, taking up each topic in its order. For ease in reference, we will insert in quotations the actual headings used in the Government brief. We will refer particularly to the evidence on the alleged direct interferences with interstate commerce.

"The Proof."

"a. The combination and its purpose."

There is no question as to the combination or its purpose. The defendants have at all times admitted that they acted in concert to prevent the enforcement of the closed shop in the building industry and to rid that industry of the uneconomic and un-American restrictions imposed by the unions. To that end they attempted to secure the adoption of the American Plan.

It is stated in the Government brief, at page 10, that the American Plan required the employment of union and non-union men in equal numbers, and that the foreman must be non-union. We respectfully submit that this is not the fact. The American Plan provided that workmen should not be discriminated against because of membership or lack of membership in a labor union. There was no restriction as to the number of union men that might be employed on any job, so long as employment was not refused to a competent worker merely because he was not a member of a San Francisco labor union. To prove that there was no discrimination, it was required that there be at least one non-union man employed in each craft on each building. All the remainder might be union men. Proof of this will be found on pages 110, 136, 153, 183, 395, 445, and 453 of the transcript.

It is true that a rule was adopted by a committee of the Builders Exchange early in the general strike in 1921 requiring the employment of a non-union foreman and 50 per cent of non-union mechanics, but this was never approved and never was made effective (p. 395).

In March, 1922, ten months after the American Plan went into effect, 90 per cent of the plumbers were members of the Union (p. 437). W. H. George, President of the Builders Exchange, testifies (p. 452) that at all times more than 70 per cent of all men engaged in building construction were union men, and further testifies, "affiant

alleges that there has been employment open to every union man desirous of having employment for over two years last past, and that no union man during said period of time has been prevented from obtaining employment at very good wages with very good working conditions".

We quote this evidence, not because the question of the proportion of union and non-union men employed under the American Plan is of importance in this case, but we do not wish to have the American Plan misunderstood and the fairness of the defendants questioned. The American Plan stands for this, and this only: a competent workman must not be discriminated against simply because he belongs or does not belong to a labor union, and there must be perfect freedom in the selection of employer and employee.

The Government in its brief, on page 13, "to show the extent of the conspiracy", quotes two letters showing that the American Plan was being discussed in other cities and was being made effective there. Certainly it is no crime to adopt the American Plan, or to urge its adoption elsewhere, any more than it is a crime for labor organizations to urge the adoption of unionism. The defendants at no time urged the adoption of the permit system outside the State.

"B. *Means adopted by Defendants to Restrain Trade.*"

"1. *The Permit System.*"

The adoption of the permit system by the defendants is frankly admitted. It is discussed in appellants' brief at page 16, and later in this brief, where it is made clear that it applied only to the sale in San Francisco for use in the strike area, of certain specified building materials, to wit, cement, lime, plaster, ready-mixed mortar, clay products, rock, sand and gravel, all produced in California, with the exception of plaster produced elsewhere, but warehoused and sold in San Francisco.

"2. *Pledges from Contractors.*"

It is admitted that before contractors could obtain permits for the materials subject to the permit system, that they signed pledges to operate on the American Plan and agreed not to discriminate against competent workmen because they did not belong to a San Francisco labor union.

"3. *Warnings.*"

It is also admitted that letters were sent out to members of the Builders Exchange in San Francisco who did not operate on the American Plan, but who refused to employ competent workmen because they did not belong to a San Francisco labor union, and stating that further permits would be denied if this practice was continued.

"4. *Inspectors.*"

It is also admitted that inspectors were employed to find out whether contractors were complying in good faith with the American Plan and had ceased discriminating against competent workmen because they were not members of a San Francisco labor union.

"5. *Grievance Committee.*"

It is also admitted that members of the Builders Exchange who failed to comply with its rules were examined and if they were found to have violated the rules they were fined or disciplined. This was in accordance with the By-Laws of the Exchange which the members agreed to when they joined (p. 241). We do not conceive that this is any crime, any more than it is a crime for a labor union to expel a member who works for less than the union scale.

"6. *Lists.*"

Much space is devoted in the Government brief, page 34 *et seq.*, in an attempt to show that so called "black lists" were circulated. The evidence shows *that the Builders Exchange, which operated the permit system, never circulated any list which could be classed as a black list.* It is true that from May to November, 1922, the Industrial Association, at the request of certain of its members who were engaged in the plumbing supply business, prepared

lists of plumbers who were operating on the closed-shop basis and sent these lists to the plumbing-houses. The plumbing-houses to which these lists were sent are all located in San Francisco (p. 154). As later shown, the circulation of these lists ceased in November, 1922, more than six months before the bill in this case was filed (pp. 61, 85, 158, 190).

"7. *Letters to Prospective Builders.*"

It is admitted that prospective builders in San Francisco were solicited to employ contractors who operated on the American Plan. This certainly cannot be fairly objected to.

"8. *Compelling Breaches of Contracts.*"

It is claimed that these defendants induced the breach of a contract between one Pasqualetti and C. Peterson and Company, a plumbing contractor, because the latter was operating a closed shop and refusing to employ competent workers because they did not belong to a San Francisco labor union. The record does not contain evidence controverting this, probably because if true it would have no bearing on this case, inasmuch as the contract was for local plumbing work and had no connection with the sale or delivery of building materials. It is significant, however, that this is the only incident of this character attempted to be proved, although the statement is made in the Government's brief, page 50, "Somewhat similar experiences were detailed in the affidavit of W. K. Hughes." As will

be shown later, the Hughes incident does not show any breach or attempted breach of contract.

(a) Alleged Interferences with Interstate Commerce are Not Sustained by the Evidence.

The Government devotes much of its brief to the quotation of evidence which it is claimed shows direct interferences with interstate shipments. All of this evidence is controverted by other evidence that no such interferences took place or that they were due to causes not connected with the industrial controversy. To quote at length this evidence would divert attention from the important question involved—whether a refusal to sell State-produced building materials for local use to contractors who do not operate on the American Plan is a violation of the Anti-Trust Act.

A large part of the evidence quoted by the Government has to do with the so-called plumbing refusals; that is, with the circulation among the plumbing-supply houses in San Francisco of lists of plumbers who were not operating on the American Plan, and certain refusals by such houses to sell to the plumbers whose names were on these lists. The argument of the Government is very largely based upon this evidence. We point out that the circulation of these lists and the refusals absolutely ceased November 8, 1922, six months before the bill in this case was filed (p. 206); that they had no connection with the permit system;

and that at no time did the permit system cover plumbing supplies (Appellant's brief, p. 22). The so-called Plumbers' Refusals are, therefore, of no importance in this case and should be disregarded.

We will not quote at length the evidence controverting that quoted by the Government. We point out, however, that every alleged instance of direct interference with interstate commerce claimed by the Government is controverted by other evidence of at least equal weight.

(b) Only State Materials were Covered by Permit System.

The permit system was at all times confined to cement, lime, plaster, ready-mixed mortar, brick, terra-cotta and clay products and sand, rock and gravel (pp. 112, 137, 445, 454). These materials, with the exception of some plaster, are produced in California, and were chosen for this reason (p. 454).

Some materials of this character do come from without the State, but, with the exception of plaster, the permit system did not apply to such materials. It did apply to plaster produced outside the State and brought to San Francisco and warehoused for sale. The permit system did not cover cement or the other specified materials, which came directly from without the State. The particular materials to be covered by the permit system were

chosen so as not to interfere with interstate commerce.

For that reason materials of which almost the entire amount used was produced in California were selected for the operation of the permit system. Some cement, brick, terra cotta, etc., di' come from without the State, but it was negligible in amount and was never subject to the permit system or to any regulation. During the entire period, products on the permit list produced outside California came freely into San Francisco, without the necessity of permits (pp. 451-4-5, 331, 462-3-7, 466).

The Government states in its brief, on page 50:

> "It was the purpose of the conspiracy to make it impossible for builders in San Francisco to obtain any building materials whether they came from within or without the State of California, without a permit from the Builders Exchange."

We respectfully submit that this is not so. The only materials covered by the permit system were those mentioned above. W. H. George testifies (p. 454):

> "This permit system applies to and involves only cement, lime, plaster, rock, sand, gravel and clay products and nothing else. In creating and maintaining this permit system over these commodities, said Builders Exchange have deliberately and advisedly excluded from any permit requirement, lumber, steel, hardware, paints, plumbing

> supplies, lath, wallboards and glass. The materials which were put under the permit system and for which members of the Builders Exchange voluntarily resolved to require of each other permits, were selected so as to carefully avoid any interference with interstate commerce, as practically all the cement used in California is manufactured in California. Nearly all the lime used in California is manufactured and made into lime mortar in California. All the rock, sand and gravel and California (clay?) products used in and around San Francisco are manufactured in the State of California. And, practically all the plaster used in and around San Francisco is brought into San Francisco either by the manufacturing companies themselves or by local dealers, consigned to them and run into their sales-rooms and warehouses and commingled with other property of said manufacturers and dealers, and thereupon becomes intrastate property and ceases to be interstate property"

Much space is devoted in the Government's brief, at page 52 *et seq.,* in an attempt to show that the permit system was later extended to lath, wallboard and Keene cement. As stated in appellant's brief at page 17, the Industrial Relations Committee of the Builders Exchange, in June, 1922, more than ten months prior to the filing of the bill, recommended that these materials be placed under the permit system, but this never went into effect. No permits were ever in fact required for these

materials (pp. 445, 454, 457). L. E. Crawford, who was in charge of the issue of all permits testifies (p. 445): "That permits have only been required in the sale or delivery of the following articles and *none other:* cement, lime, plaster, rock, sand, gravel and clay products." W. H. George testifies to the same fact (pp. 454, 457). There is no evidence in the record that permits for any other materials were ever required.

Although more than 28,000 permits in all were issued there is no evidence in the record that any permit was ever issued for any material not mentioned above.

Not only was the permit system confined to the enumerated materials, but it covered only sales in San Francisco of materials to be used in the strike area—that is, in San Francisco and its immediate vicinity (pp. 81, 327). As to materials to be used outside the strike area, there were no requirements of any kind.

The following are instances of alleged interference with interstate shipments, dealt with in the Government's brief:

(c) Evidence on Alleged Direct Interferences with Interstate Commerce.

"1.—*Plaster.*"

The Government's brief, at page 56, states that five plastering contractors, known as "the big five," formed the Golden Gate Building Materials Company.

This is true. "The big five" plasterers formed this company for the purpose of securing dealers' prices (p. 444). It did not sell to any one other than " the big five." Dealers, as well as contractors, resented this attempt on the part of "the big five" to enjoy dealers' prices which, as contractors, they were not entitled to and this was the cause of their difficulties. "The big five" plasterers, as individuals, were members of the Builders Exchange and could obtain all the permits they desired (p. 338).

It is also stated in the Government's brief, page 56, that not more than 1 per cent of the plaster used in San Francisco is made in California. In answer to this, W. H. George (p. 454) testifies that permits were not required for goods coming directly from without the State, and that plaster is brought into San Francisco by the manufacturers or dealers themselves and kept in stock, from which local deliveries are made. Towle testifies to the same effect (p. 470).

At page 56 in the Government's brief, the testimony of A. Knowles is recited to the effect that he was refused plaster to complete the Golden Gate and Loewe Warfield theatres. This is denied by Towle, the Secretary of the Pacific Portland Cement Company, who testifies (p. 469), that he has read the affidavit of Knowles; that the same is not true; that the Pacific Portland Cement Company, of which Towle is assistant secretary, supplied the plaster required by Knowles for said theatres.

Towle then gives the dates and amounts of the deliveries. Towle further testifies that no order by Knowles for plaster was ever refused (p. 469); "said Pacific Portland Cement Company, Consolidated, furnished all the plaster ordered by said A. Knowles for the plastering of said Loewe and Golden Gate theatres, in the city of San Francisco, and no order of any kind of said A. Knowles for said theatres or either of them was refused."

"*Montana.*"—The Government in its brief, at p. 57, recites evidence which it claims shows that the Golden Gate Building Materials Company, in April 1922, was prevented from buying cement from the Three Forks Portland Cement Company at Hanover, Montana, by the threat of the McCormick Steamship Company officers to increase the transportation rates, because the Golden Gate Company was not a member of the Builders Exchange; and that the Three Forks Company refused to make further shipments. These statements are denied by the officers of the steamship company (pp. 463, 468), who further assert that, during the period in question, the steamship company continued to carry large shipments of building materials to the Golden Gate Company at regular rates. (See Appellant's Brief, pp. 107, 108.)

"*Nevada.*"—The Government, in its brief at page 58, sets forth evidence which it claims shows that the Pacific Portland Cement Company refused to sell plaster produced in Nevada, but warehoused in San Francisco, to certain persons, in-

cluding Civic Center Supply Company and Gray Thorning.

The Pacific Portland Cement Company is a California corporation with headquarters in San Francisco. While it manufactures all of its cement in California, it has a plaster plant in Nevada and ships plaster from that plant to its warehouses in San Francisco, from where it is sold and delivered for local consumption (pp. 469, 470).

The alleged refusals to sell to Civic Center Supply Company are denied by an officer of the cement company, who testifies (p. 472) that

> "during 1922 and 1923 the said cement company did not refuse to sell its plaster to the said affiant or to said Civic Center Supply Company, but, on the contrary, during said years and at all times during said years, said cement company sold through its warehouse in San Francisco, Cal., sundry and various orders of plaster and other building materials, as required and ordered by said Gordon S. Chamberlain and the said Civic Center Supply Company."

As to the alleged refusal to sell to Gray Thorning Company, the same officer of the cement company testifies (p. 471) that there is no record of any request to purchase being made by Gray Thorning; that during the period in question there was a great shortage of plaster and the cement company was unable to supply all demands; that by reason thereof, it gave preference to its regular

customers; that Gray Thorning was not a regular customer and if it had given an order it would have been necessary to reject it.

"Nevada."—The Government, at page 62 of its brief, recites evidence of an alleged cancellation by Standard Gypsum Company, with a plant in Nevada, of a contract to sell plaster to the Golden Gate Company, in California. It is claimed that this cancellation was caused by the protest of certain dealers in the San Joaquin Valley that the Golden Gate Company was not a member of the Builders Exchange. This is completely answered by the affidavit of the sales manager of the Gypsum Company, who testifies (p. 446):

> "For a certain period of time, we refrained from selling the Golden Gate Building Material Company, for the reason that it appeared to us the institution was formed by certain plastering contractors, merely for the purpose of obtaining building supplies at dealers' prices. Under these conditions, it appeared to us that it would be unfair to other plastering contractors if we recognized the Golden Gate Building Material Company as a dealer. When the Golden Gate Building Material Company started to function as a dealer, selling all plastering contractors, as well as those contractors who had stock in that company, at regular retail prices, the Golden Gate Building Material Company was entitled, in our opinion, to receive goods at dealers' prices in the same manner as any other building-supply dealer.

> Accordingly, we started selling to the Golden Gate Building Material Company and have since continued."

Not only is the Government claim refuted by this testimony, but the Government witness Barrymore testifies that at no time did the permit system apply to materials used in the San Joaquin Valley (p. 327). The same incident is dealt with in appellant's brief, pages 106 and 107.

"*Utah.*"—The Government, at page 63 of its brief, recites a portion of the evidence of the transactions between one Alexander Gray, a union official in San Francisco, and the Jumbo Plaster Company of Utah. It is claimed that the evidence shows that the Jumbo Company refused to continue selling to Gray because he was a union official. This testimony is dealt with in appellant's brief at pages 101 and 102. It appears from the affidavit of Payne, the principal officer of the Jumbo Company, that his refusal to continue to sell to Gray had nothing to do with industrial conditions in San Francisco or with the permit system. He testifies that certain of the shipments were delayed by reason of floods and damage to the plant in Utah; that later he visited San Francisco with the purpose of establishing a local agency. There he met Gray and found that he was not a recognized dealer; had falsely stated the destination of the plaster he was purchasing; had given a false name and had no facilities for handling the product. Thereupon the Jumbo Company appointed Henry

Cowell Lime and Cement Company as its exclusive agent and refused to accept orders from others, including Gray (pp. 269-272).

"Utah."—The Government, at page 67 of its brief, recites a portion of the evidence of the refusal of Jumbo Plaster Company of Utah to accept certain orders for plaster from Gray Thorning Company at Redwood City, Cal. The reason for this refusal is set forth in the testimony of Payne, president of the Jumbo Company (pp. 271, 272), who states that after the Cowell Lime and Cement Company had become the general agents in California for the Jumbo Company that company would not accept orders from other concerns.

"2—Cement."

"Kansas."—The Government devotes pages 68 to 74 of its brief to the recitation of a portion of the evidence of the dealings between Best Brothers, of Kansas, and the Golden Gate Building Materials Company and McGruer and Simpson, one of the "the big five" plasterers. It is claimed that this evidence shows an attempt by these defendants to interfere with interstate shipments. A reading of the evidence will convince that the incident had no connection with the industrial dispute in San Francisco, but represented the protest so often referred to, of recognized dealers against the selling of materials at dealers' prices to the Golden Gate Company, which was a combination of consumers desiring to obtain dealers' prices. It is also

clear, from the evidence, that some of the San Francisco competitors of the Best Company were using the industrial dispute as a cloak for securing trade advantages for their own type of material over that of Best. This was finally realized by the representative of the Best Company, who, on May 18, 1923, wrote to his principal (p. 338): "The outstanding feature of this market for your products is a kaleidoscopic change from an effort to establish an 'open shop' to a battle for trade supremacy between the proponents of hardwall and of lime-gauged mortar." The same letter states that no discrimination was being practiced against "the big five" plasterers, and that the Industrial Association refused to permit itself to be used as a weapon to gain personal advantages by the various firms engaged in the plaster business. On May 27, 1923, the principal officer of Best Cement wrote to his San Francisco agent (p. 334), stating that he realized that the protests made by Mr. George against selling to the Golden Gate Company and McGruer and Simpson were in reality an attempt by Mr. George, as president of the Cowell Lime and Cement Company, an important factor in the plaster business, to discourage the use in California of Keene cement, a competing product.

Lomax, the agent in San Francisco of Best Brothers, further testifies (p. 462):

> "At no time previously and at no time since has any condition been imposed requiring any one to furnish a permit before

said John R. Steffens Lomax Company would ship to them any of said Best Brothers Keene's cement; and upon no occasion was any threat made to us concerning our shipping said Keene's cement in without permits.

"Keen competition exists in the plastering industry between the users of hardwall plaster and the users of lime-gauged Keene's, the latter substance being a material frequently used instead of hardwall plaster. Affiant knows that in pushing the sale of Keene cement he had the aggressive competition of the manufacturers and sellers of hardwall. That, aside from said competition of the sellers of said hardwall, affiant has not been, nor has the firm of which he is a copartner ever been, interfered with in any shipment of any Keene's cement from outside the State of California into the State of California; nor has he been threatened in any manner if he or his firm shipped, and at no time by threat, persuasion or intimidation has any effort been made to force affiant to sell only on terms."

The evidence on this particular matter occupies many pages in the transcript and in the Government's brief. We submit that a reading of the evidence will show that the incident has no significance or importance in the case. The matter is dealt with briefly in appellant's brief at page 104.

"*Ohio.*"—The Government, at pages 74 to 82 of its brief, recites a portion of the evidence respecting the transactions between Sandusky

Cement Company of Ohio and Gray Thorning Lumber Company of Redwood City, Cal. It is claimed that this evidence shows a refusal by the Sandusky Company to sell cement to Gray Thorning, because it could not secure a permit from the Builders Exchange.

This incident is dealt with in appellant's brief at pages 102-104, where the evidence is discussed. The evidence shows that the quantity of cement sold and shipped by the Sandusky Company to California constantly increased during the period in question, and that all these shipments were made without permits (pp. 443-4). It also appears from the testimony of Rodgers (p. 442), sales manager of Sandusky Portland Cement Company, that its refusal to continue to sell to Gray Thorning was not based upon the failure of that company to submit a permit, but that this was the reason given by the Sandusky Company to Gray Thorning to discourage it from sending in further orders; that the reason the Sandusky Company desired to discourage further orders of Gray Thorning was because the latter company was diverting the cement purchased by it into territory which had been exclusively allotted to other dealers, and the Sandusky Company realized that it would lose the business of said dealers if the practice were permitted to continue.

"3—Lime."

"Washington."—At page 82 of the Government's brief is set out a portion of the evidence respecting the dealings of the Tacoma and Roche Harbor Lime Company, of Washington, with the Civic Center Supply Company, of San Francisco, and Gray Thorning Company of Redwood City, California. It is claimed that this evidence shows that the lime company refused to sell lime to these companies because they could not furnish permits. We submit that the evidence shows directly to the contrary. Reveal, the local agent of the lime company, testifies (p. 467):

> "This affiant further alleges that as agent for said Tacoma and Roche Harbor Lime Company, he has, during all of said periods sold lime without restriction to any dealer or purchaser, whether that dealer or purchaser had permits or did not have permits. The product of the Tacoma and Roche Harbor Lime Company is manufactured in the State of Washington, and affiant and said Tacoma and Roche Harbor Lime Company have never refused to sell to any one on account of the proposed purchaser not having a permit of the Builders' Exchange."

As to the charges preferred against Reveal at the Builders Exchange, W. H. George, president of that organization, testified (p. 455) that such charges were preferred because it was thought that

Reveal was dealing with local lime; that when it was found that Reveal was selling lime produced outside the State, the charges were immediately withdrawn. "And said proceedings against said Reveal were stopped merely because of a desire on the part of the Builders Exchange and others to avoid any possible interference with Interstate Commerce."

It therefore appears from the evidence that Roche Harbor lime was, during all this period, sold without the requirement of a permit and that the Builders Exchange withdrew all charges when it learned that Reveal was selling lime coming from another State. This matter is also dealt with in appellant's brief at page 109.

"Victoria, British Columbia."—At page 84 of the Government's brief, a portion of the evidence respecting the dealings between Hughes, the San Francisco agent for the Pirie Lime Syndicate of British Columbia and the Golden Gate Building Materials Company. It is claimed that the evidence shows that a contract between the Golden Gate Company and Hughes was cancelled, owing to the opposition of the Industrial Association. The evidence shows that the agreement was cancelled at the request of the Golden Gate Company, which found that it could purchase the lime cheaper in San Francisco (p. 460).

On page 85 of the Government's brief, the following appears:

"The record does not support the following statement in appellant's brief at page 108:

" 'This testimony shows conclusively that the request for the cancellation originated with Golden Gate Company itself, which, prior to the date of shipment, had embraced the American Plan."

This comment illustrates the difficulty of collating and remembering the evidence. We direct attention to the following evidence in support of our statement.

Hughes, agent of Pirie Lime Syndicate, testifies (p. 393): "* * * upon the earnest solicitation of the said Golden Gate Building Materials Company, it was mutually agreed between affiant and said Golden Gate Building Materials Company to cancel said contract; * * *"

Leon G. Levy testifies (p. 460) that "said Hughes complained to affiant that the five plasterers connected with the Golden Gate Building Materials Company refused to accept the 1,500 barrels of lime that the Golden Gate Building Materials Company had ordered of said W. K. Hughes because of the fact that they could buy said lime at a cheaper price in the market of San Francisco than the said W. K. Hughes was contracting to furnish it for." The same witness testifies that the Golden Gate Company had accepted the American Plan (p. 460). The letter cancelling the contract appears in the transcript (p. 430) and reads as follows:

"W. K. HUGHES & Co.

Nov. 4, 1922.

Golden Gate Building Materials Co.,
559 10th Street,
San Francisco.

DEAR SIRS:

Confirming the writer's conversation with your Mr. Knowles relative to the purchase thru us of 1,500 barrels of lime, we now find that it is convenient to make cancellation of this contract *in line with Mr. Knowles request,* and we therefore have considered the contract cancelled by mutual agreement.

Very truly yours,
W. K. HUGHES & Co.,
By —— ——
President.

The only significance of this matter is to illustrate the difficulty of collating the different parts of the transcript and how easy it is to overlook important testimony.

"*Vancouver, British Columbia.*"—At page 85 of the Government's brief, the statement is made that Horton, of the Portland Lime and Cement Company of British Columbia, refused lime to Gray Thorning Company, of Redwood City, Cal. The only reference to this in the transcript is in an affidavit by Thorning, which reads (p. 317): "That also Gray Thorning Lumber Company was refused lime by Mr. Horton of the Portland Lime and

Cement Company, which produces lime at Blubber Bay, Vancouver, British Columbia." The reason for the alleged refusal, its date or the surrounding circumstances do not appear. Nor does it appear that the refusal was caused by or due to any acts on the part of these defendants.

(d) Evidence on So-called Plumbing Refusals.

"Plumbing Supplies."

In the brief of the Government, commencing at page 85, much space is devoted to the quotation and discussion of a portion of the evidence on the alleged refusal of plumbing-supply houses in San Francisco to sell to contractors who were operating on the closed-shop basis. It is sought to make out that the permit system covered plumbing supplies.

The Permit System at no time covered plumbing supplies (p. 445).

In April, 1922, the plumbers struck to enforce their demand for the closed shop on all building work. This was more than a year after the beginning of the general building strike in May, 1921, and six months after the termination of the general strike in September, 1921. Up to April, 1922, the plumbing-supply houses had not been directly involved, but at that time a number of plumbing-supply houses, in order to protect themselves against boycott and blacklist by the strikers, refused to sell their materials to the unions or their confederates (p. 157). In connection with these

refusals, the names of the plumbers who were trying to enforce the closed shop and who were discriminating against union men were distributed among the plumbing supply houses in San Francisco. There is evidence that, in some cases, the plumbing-supply houses refused to sell materials which were on their shelves in San Francisco to contractors who were operating on the closed-shop basis. These refusals are entirely separate and independent of the permit system. They did not take place until more than a year after the permit system was put into effect; different parties were involved and there was no connection either in plan or operation with the permit system.

These refusals, and the circulation of the lists among the plumbing-supply houses, ceased in November 1922, more than six months before the bill in this action was filed, and should therefore be disregarded.

After that date, there was absolutely no restriction upon the purchase of plumbing-supplies by any person, no matter what his views or practices with respect to the closed shop.

We submit, therefore, that the so-called plumbers' refusals and the circulation of the lists among the plumbing-houses in San Francisco, both of which absolutely ceased six months before the bill in this case was filed, are of no importance or significance in this case.

The permit system covered certain State materials only. Permits for these materials were not issued to any person who enforced the closed shop or discriminated against non-union men. If a builder employed a plumbing contractor who enforced the closed shop, he was denied a permit for sand and gravel. This was the case during all the time that the permit system was in effect. The general strike was over in September, 1921. In March, 1922, the plumbers, plasterers and bricklayers struck to enforce the closed shop, but the other crafts did not strike. The permit system, therefore, operated against the plumbers, plasterers and bricklayers only. It did so, not by denying them plumbing of other supplies coming from without the State, but by denying them State materials; cement, lime plaster, ready-mixed mortar, brick and clay products, and rock, sand and gravel, the materials and the only materials which were ever subject to the permit system.

Counsel for the Government seeks to make out that there was a connection between the permit system and the plumbers' refusals after such refusals had terminated in November, 1922. This claim is not supported by the evidence. The permit system operated after November, 1922, the date on which the plumbers' refusals ceased, just as it had prior to that date. It never covered plumbers' supplies, but permits for State materials were, at all times, refused to persons who employed plumbing contractors who enforced the closed shop and dis-

criminated against non-union men. This presents the important question in this case. Was the refusal of permits under such circumstances a violation of the Anti-Trust Act? Was the denial of San Francisco sand to an owner who employed a closed-shop plumber an interference with interstate commerce and a violation of the Anti-Trust Act?

Counsel for the Government makes his argument on this point at page 91 of his brief. He says:

> "The plan was in force not to issue permits for any building material until it was known that the plumbing contractor would support the American Plan. If the plumbing contractor was not satisfactory, none of the articles on the permit list could be purchased; and if none of the articles on the permit lists could be purchased, then, necessarily, the plumbing supplies could not be purchased."

As has been shown, certain State materials only were on the permit list. Those materials were denied in San Francisco for use in San Francisco to any one who employed a closed-shop plumbing contractor. The owner and the contractor could buy all of the plumbing materials they desired, without any restriction whatever, but they could not buy San Francisco sand or other State materials covered by the permit system. It is claimed that this is an interference with interstate com-

merce in plumbing materials, although any one could purchase plumbing materials without a permit, and although there is no evidence in the record that any person ever failed to or was unable to purchase plumbing materials because of a refusal to sell the State materials subject to the permit system.

We submit that any restraint of interstate commerce in plumbing materials which might be caused by a refusal to sell sand is so remote, secondary, indirect and incidental as not to violate the Anti-Trust Act. The strike in the building trades in San Francisco, which tied up building construction in which interstate materials formed a substantial part, was a much more direct interference with interstate commerce than any act on the part of these defendants, and yet no one would claim that the unions, in calling the strike, violated the Anti-Trust Act.

The so-called plumbers' refusals are also dealt with at page 22 of appellants' brief, where the reason for the inclusion in the record of so much evidence on this point is fully explained.

(e) Summary of Evidence of Alleged Direct Interferences.

1. These instances, upon investigation, are found to comprise not more than ten in all, scattered over almost two years of time.

2. The total amount of materials involved was small, probably not to exceed $30,000, during a period when more than $100,000,000 of building work was being done in San Francisco.

3. That but four purchasers in all were involved:

(*a*) Golden Gate Building Materials Company, a company formed by five boss plasterers to obtain dealers' prices and who were, therefore, fought by all legitimate dealers, not by reason of the industrial controversy, but for trade reasons. The five owners of the company were members of the Builders Exchange and had no difficulty in securing materials;

(*b*) Gray Thorning Company, which was invading territory exclusively allotted to other dealers;

(*c*) Alexander Gray, a union official masquerading under an assumed name and giving false information as to the destination of materials sought to be purchased;

(*d*) Civic Center Supply Company.

4. In no case have the alleged refusals been connected with the principal defendants, or shown to have been pursuant to any plan or agreement between the defendants in San Francisco.

5. Each and every alleged refusal is controverted by evidence of at least equal weight, showing that the alleged interferences did not in fact

take place, or were due to trade causes, independent of the American Plan and the permit system.

6. The refusals to sell plumbing supplies ceased in November, 1922, six months before the bill in this case was filed.

The evidence on the so-called direct interferences does not justify any decree against these defendants. The defendants not only deny that they had any intent or plan to interfere with interstate shipments, but they further contend that they did not in fact interfere with any interstate transaction, and that the evidence so shows.

(f) Examination of Argument for Government.

"The Argument."

In its argument the Government announces the following propositions:

"(*a*) *The Object Sought to be Accomplished by the Defendants Was Unlawful.*"

The object sought to be accomplished by these defendants was not only lawful, it was laudable. The object sought was the freeing of the building industry in San Francis · from .ne closed-shop restriction which prevented competent workmen from obtaining employment because they did not belong to a San Francisco labor union. Not only was the object lawful, but the question as to whether it was lawful or unlawful is of no importance here,

unless these defendants in seeking to accomplish their object violated the Anti-Trust Act. The learned judge in the court below said respecting the American Plan (p. 35): "With the merits or demerits of this plan, as with the recurring conflicts between employers and labor unions, this Court, acting within its jurisdiction, cannot lawfully be concerned. * * * The purpose therefore of the defendants, in so far as it may be sought or attained without running counter to the Federal laws, cannot be interfered with by a Federal Court."

The defendants were tried before a State court and were found not to have violated the Anti-Trust Act of California.

"(*b*) *The Means Employed by the Defendants to Accomplish Their Object Directly Restrained Interstate Commerce.*"

This turns upon a question of fact. The defendants contend that the evidence shows that they did not interfere with interstate goods or shipments and studiously refrained from doing so. Whether the operation of the permit system on State goods amounts to an unlawful restraint of interstate commerce is a question of fact and law which is presented to this Court for decision. *Duplex vs. Deering, Eastern States Retail Lumber Dealers Association vs. United States,* and *Montague vs. Lowry,* cited by the Government, are all cases in-

volving a concert of action in a number of States, intended to, and which did, directly interfere with and restrain interstate commerce. This case, on the contrary, involves acts in San Francisco only, affecting the sale for local use of State-produced materials, without intention to interfere with interstate commerce and which, in fact, did not interfere with interstate commerce. The cases mentioned are fully discussed in appellants' opening brief.

"(c) *The Restraint on Interstate Commerce was Material.*"

It has already been shown that these defendants did not interfere with shipments of materials produced in other States.

Counsel devotes some pages to an attempt to distinguish the *Herkert and Meisel* case and the *Coronado* case from the case at bar. It is claimed that they are to be distinguished because they involved manufacture and mining. The attempt of counsel to distinguish these cases makes their similarity clearer. All three were local, confined to a small area in a single State, and arose out of local industrial controversies. In the *Coronado* case mining was restrained; in the *Herkert and Meisel* case manufacturing was restrained; and in the case at bar if there was a restraint of anything, it was a restraint of building. Mining, manufacturing

and building are not commerce. In the *Coronado* case the strikers prevented the mining of coal and its shipment in interstate commerce, actually destroying one car ready for shipment. In the *Herkert and Meisel* case, the strikers announced their intention of destroying the interstate business of the manufacturer, who shipped 90 per cent of his product in interstate commerce and who imported his raw materials from other States. When the defendants forced him to close down, the manufacturer had unfilled orders for interstate shipment amounting to more than a hundred thousand dollars. The strikers forced the factory to close, the manufacturer of trunks and their transportation out in interstate commerce ceased, and of necessity the importation of raw materials in interstate commerce must also have ceased. Yet it was held in both cases that the interference with interstate commerce resulting from the strikers' acts did not constitute a violation of the Anti-Trust Act.

And so here. The defendants to rid the building industry in San Francisco of the closed-shop restriction, refused to sell State-produced materials for use in San Francisco on closed-shop jobs. It is not shown that this resulted in the importation of any less quantity of material from other States. But even if it were shown that less materials were imported from without the State, it would not be a violation of the Anti-Trust Act; just as in the *Coronado* case the fact that the coal did not go out into interstate com-

merce was held not to be a violation of the Act; and in the *Herkert and Meisel* case the fact that the trunks did not go out into interstate commerce or the raw materials come in was held not to constitute a violation of the Act. If the argument of the Government were to be logically followed, the strike of the building workers which tied up building and resulted in a stoppage of the importation of building materials produced in other States must be held to be a violation of the Act. We submit that if there was any diminution in interstate commerce resulting from the acts of these defendants, which fact does not appear in the proof, such diminution does not make these defendants liable for a violation of the Anti-Trust Act. As in the *Herkert and Meisel* and *Coronado* cases, any restraint of interstate commerce was so remote, incidental, and secondary as not to come within the Act.

Conclusion.

This reply brief has of necessity been hastily prepared and is not intended as a general discussion of the facts or the law of the case. Such discussion will be found in appellant's opening brief. The purpose of this reply brief is to direct the attention of the Court to what we conceive is the important question in this case and to answer the various statements of evidence and fact contained in the brief for the Government. As an aid to the

understanding of the facts we have inserted a
endar of the principal events.

Respectfully submitted,

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